U.S. - E.U. Competition Policy: Common Themes, Common Challenges

(Selected Documents)

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1. GLOBAL ANTITRUST OFFICIALS ADOPT MERGER REVIEW PRINCIPLES

Date: **September 30, 2002**
U.S. antitrust officials and representatives from 50 jurisdictions have adopted guiding principles for multi-jurisdictional merger reviews, according to a September 30 Justice Department press release.

The non-binding principles cover sovereignty; transparency; non-discrimination on basis of nationality; fair, timely and effective review; coordination; convergence; and confidentiality. They were agreed to at the first annual meeting of the International Competition Network (ICN) September 28-29 in Naples, Italy.

"Government policy ought to spur, not retard competition," said Timothy Muris, chairman of the U.S. Federal Trade Commission (FTC) and one of the U.S. delegates at the meeting.

Meeting representatives also endorsed "recommended practices" for merger notification. They recommended that:

-- jurisdiction only be asserted over transactions within that jurisdiction;

-- notification be clear and understandable and based on readily accessible information;

-- notification of proposed mergers be in "good faith," and involved parties have "reasonable time" to file a review notification "following a clearly defined triggering event."

The ICN was launched in October 2001 by the Justice Department, FTC, and 13 foreign antitrust agencies.

Following is the text of the Justice Department's press release:

ASSISTANT ATTORNEY GENERAL CHARLES A. JAMES ENCOURAGES MERGER PROCESS REFORM AT INTERNATIONAL COMPETITION NETWORK CONFERENCE IN NAPLES, ITALY

WASHINGTON, D.C. -- Charles A. James, Assistant Attorney General in charge of the Justice Department's Antitrust Division, and Timothy J. Muris, Chairman of the Federal Trade Commission, worked with antitrust agencies from 50 jurisdictions to facilitate reforms in multi-jurisdictional merger review and to promote effective competition advocacy efforts, objectives that were reviewed at the first annual International Competition Network (ICN) Conference in Naples, Italy on September 28-29, 2002. Consistent with the ICN's emphasis on working with the private sector, representatives of antitrust agencies were joined by approximately 50 representatives of international organizations, practitioners of antitrust law, economists, industry and consumer associations, and members of the academic community.

The ICN was launched in October 2001 by the Department of Justice, the Federal Trade Commission, and 13 foreign antitrust agencies to provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement.

At the conference, ICN members adopted 8 Guiding Principles around which a merger review regime should be built: sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely, and effective review; coordination; convergence; and confidentiality. The proposals are non-binding and it is left to governments to implement them voluntarily, through unilateral, bilateral or multilateral arrangements, as appropriate.

Three detailed Recommended Practices for merger notification procedures were also endorsed by the members, realizing a common desire to recognize the concepts of jurisdictional nexus, the development of objective and understandable merger notification thresholds, and appropriate flexibility in the timing of merger notifications.

-- Jurisdictional Nexus. These recommended practices provide that jurisdiction should be asserted only over those transactions that have a nexus with the jurisdiction concerned that meets an appropriate standard of materiality. This nexus should be based on activity within that jurisdiction as measured by reference to the activities of at least two parties to the transaction and/or of the acquired business in the local territory.

-- Notification Thresholds. The recommended practices provide that notification thresholds should be clear and understandable, should be based on objectively quantifiable criteria, and should be based on information that is readily accessible to the

merging parties.

-- Timing of Notification. The recommended practices provide that parties should be permitted to notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction. They further provide that jurisdictions that prohibit closing while the competition agency reviews the transaction should not impose deadlines for notification and that jurisdictions that do not prohibit closing pending review should allow parties a reasonable time in which to file notification following a clearly defined triggering event.

The members agreed to continue to refine these practices and develop additional ones over the next several months for adoption at the next annual conference.

"Implementation of the Guiding Principles and Recommended Practices will make merger review processes around the world more efficient and effective, while at the same time reducing delay and the investigative burden on merging firms in a wide range of transactions," said Assistant Attorney General James. "The Guiding Principles and Recommended Practices are an important first step in the direction of global convergence toward sound merger practices and procedures."

Antitrust officials at the conference also discussed the role of competition advocacy in promoting a culture of competition. Discussions centered around an Advocacy Study conducted by the ICN Advocacy Working Group during the past year. The report presented by the Group at the conference includes a detailed analysis of both the theory and the practice of competition advocacy. In addition, the report underscores the importance of advocacy to the ability of competition authorities to promote economic development and procompetitive reform within their governments.

"Government policy ought to spur, not retard, competition," noted Chairman Muris. "The ICN has made substantial progress in identifying techniques that antitrust agencies can use to press their governments to adopt procompetition policies. This effort will continue to be a key ICN initiative in the coming year. Even modest improvements in the quality of competition advocacy can make important contributions to better economic performance."

In addition to continuing work in multijurisdictional merger review and competition advocacy, the ICN has established a working group on capacity building and competition policy implementation.

All ICN documents are available at: www.internationalcompetitionnetwork.org.

2. U.S. CALLS FOR TRANSATLANTIC DIALOGUE ON ANTITRUST ISSUES

Date: **May 17, 2002**
The United States and Europe need to identify the key issues in North Atlantic competition and work together to address them, according to William Kolasky, a deputy assistant attorney general of the Justice Department's Antitrust Division.

Addressing a London conference sponsored by the British Institute of International and Comparative Law (BIICL) May 17, Kolasky said the United States applauds the recent declaration by European Competition Commissioner Mario Monti that the goal of competition policy is consumer welfare.

Kolasky went on to discuss five areas of "historical divergence" between U.S. and EU competition policy: Efficiencies in Merger Review, Fidelity Rebates, Predatory Pricing, The Essential Facilities Doctrine, and Monopoly Leveraging

He emphasized that his purpose was not to tell Europeans what their policies should be but "to open up a more in-depth transatlantic dialogue, both to determine how real these differences are and to begin discussing whether and how we should try to bridge them."

"Our goal is not convergence for its own sake, but rather convergence around sound competition policies," Kolasky said.

Following is a transcript of his remarks:

Good morning. It is delightful to be here today, in one of my favorite cities in the world. I made it a point to visit Berkeley Square last night, hoping to hear the nightingales sing.

This address grows out of the discussions we had with the EU last fall over GE/Honeywell,(2) but is not really about GE/Honeywell. What we discovered as we explored the reasons for our different outcomes in that case was that they reflected some deeper differences between competition policy in the United States and in Europe, especially in the area of abuse of dominance and monopolization.

As I began to investigate these differences, I happened to read an article in The Economist entitled "The Need for Shock Treatment" reporting on concerns in Europe about a "growth gap" with the United States: in 1991 America's per capita GDP was 42% greater than the EU average; a decade later the gap had widened to 54%.(3) The article attributed this growth gap to the slow pace of market liberalisation in several key sectors of the European economy. The graph I've put up, showing the relationship for OECD member countries between economic growth and an OECD index of market regulation tends to support that thesis. (Figure 1) It shows that countries with less regulation tend to

have higher growth rates.

The Economist article started me thinking about whether differences in competition policy may be contributing to the slower growth of the European economy. In the United States, we have gone through a complete reform of our competition policy over the last quarter century. While it is always hard to determine cause-and-effect, this fundamental shift in antitrust policy coincided with the fastest period of economic growth the United States has enjoyed since the period immediately after WWII.

We see Europe going through a similar transition today. I think you all would agree that before 1995 European competition law suffered from many of the same problems under which U.S. antitrust law labored a generation ago. EU competition law relied on wooden, formalistic rules. And, as has sometimes been the case in the United States as well, EU law sometimes placed more emphasis on protecting competitors than consumers, and viewed efficiencies suspiciously.

Under the leadership of Karel Van Miert, Mario Monti, and Alex Schaub the picture has changed dramatically over the last seven years. These three have initiated a series of reforms that will change competition policy in Europe every bit as dramatically as the Chicago School revolution changed it in the United States a generation ago. These include, most notably, the Notice on Vertical Restraints, the Modernization Initiative, the new leniency policy, the Technology Block Exemption Report and, most recently, the Merger Process Reform Green Paper. Alex Schaub, who oversaw the implementation of many of these reforms, will be leaving DG Comp this summer, but he should be very proud of what he has accomplished during his tenure.

As important as these reforms are, none was more significant than Commissioner Monti's firm embrace, at a speech at Merchant Taylor's Hall in London last July, of the consumer welfare approach to competition policy. In that speech Commissioner Monti became the first Competition Commissioner to declare unequivocally that "[T]he goal of competition policy is consumer welfare."(4) Not "a" goal, but "the" goal. We in the United States applaud Commissioner Monti's bold leadership in embracing the consumer welfare model of competition policy.

In the interest of promoting greater convergence, not just in how we talk about competition policy, but in how we practice it, I attempted in a speech I gave in Capetown, South Africa, in March to articulate six guiding principles for sound competition policy, which are displayed on my next slide.(5) (Figure 2) I do not propose to cover these in detail today. Instead, I would like to show how these principles might be applied in practice by examining what we see as five areas of historical divergence between US and EU competition policy. The five areas are: efficiencies, fidelity discounts, predatory pricing, essential facilities, and monopoly leveraging.

My purpose in shining a light on these areas is not to try to tell you what your policies should be. We have different legal traditions, different institutions, and different economies. Any sound competition policy must take account of these differences. What works for us is not necessarily best for you. My purpose instead is simply to identify the key issues and to propose that we work together to address them.

I. Efficiencies in Merger Review

In the United States, our Merger Guidelines have included what some refer to as an "efficiencies defense" since the very beginning in 1968. In Europe, by contrast, it was widely believed until very recently that the Commission would not treat efficiencies as a defense to a merger that created or strengthened a dominant position, and that it might even view efficiencies as an additional reason for prohibiting a merger on the ground that they would further entrench the merged firm's dominant position.(6)

In his Merchant Taylor's Hall speech, Commissioner Monti took a critical step toward clarifying the Commission's view of efficiencies. He announced that, "We are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition."(7) The director of the EU Merger Task Force, Goetz Drauz, built on these remarks at the ABA Section of Antitrust Law's Spring Meeting last month. He invited merging parties to tell the MTF about the efficiencies they expect to realize from their transactions, assuring them that efficiencies will not be used as a reason to challenge a merger.

Now that the Commission has clarified that efficiencies should be viewed positively, the question is, as Goetz Drauz put it in Washington, "not whether, but how." This is still a lively subject of debate on our side of the Atlantic. There is a widespread perception, for example, that in the United States we apply a so-called "consumer welfare" test, which takes into account only those efficiencies that are likely to be passed on to consumers in the form of lower prices. In Canada, the Competition Tribunal in Superior Propane recently rejected this test, opting instead for a "part total welfare, part wealth distribution weighting" test, which it held was mandated by the Canadian statute.(8) Under this test, the Tribunal would approve a merger even if it is likely to result in higher prices, so long as the cost savings exceed what economists call the "deadweight loss" from any reduction in output plus any negative wealth distribution effect on poor consumers.

In practice, our test is less of a pure "consumer welfare" test than is generally thought. While we give greater weight to those efficiencies that will be passed on to consumers through lower prices in the near term, footnote 37 to the Guidelines, which was added as part of the 1997 revisions, makes it clear that we "also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices" where we think those efficiencies will ultimately redound to society's benefit.(9)

The Bell Atlantic-NYNEX merger is a good example of a case where the Division declined to challenge a merger even though a strict price test might have lead to a contrary result. In that case, the Division concluded that while the likely price effects of the efficiencies were small, the efficiencies themselves were so likely and so large and the possible anticompetitive effects so speculative that we should clear the merger nevertheless. Subsequent history has proven the Division right. A retrospective study by one of the merger's critics, AARP, found that the Bell Atlantic/NYNEX merger did, in fact, deliver very substantial cost-savings that surpassed even the parties' projections, as well as a "marked improvement" in service quality.(10)

We have agreed with the European Commission to make this subject a priority of our joint US/EU merger working group. We are very much looking forward to working together in this critical area.

II. Fidelity Rebates

Fidelity rebates are rewards or discounts given to customers who purchase all or a specified portion of their requirements for a given product or service from a dominant firm. In Europe, the Commission and the European Court of Justice have come close to establishing a per se rule against fidelity rebates granted by a dominant firm, the only exceptions being short-term discount programs and volume discounts that are cost-justified and open to all customers on equal terms.(11)

In the United States, by contrast, we tend to view any reduction in price by a leading firm as moving prices toward the competitive ideal so long as the resulting prices are not below cost. We have generally refrained, therefore, from challenging discount programs like these under our antitrust laws.

This difference in approach is illustrated most starkly in the treatment of Virgin Atlantic's complaint about British Airways' incentive system for travel agents, which gave agents extra commissions in return for meeting or exceeding the previous year's sales of BA tickets. The European Commission found BA's incentive program to be an abuse of dominance.(12) By contrast, when Virgin sued BA on the same theory in the United States, the trial court granted summary judgment for BA and that judgment was affirmed on appeal.(13)

This is another area where a transatlantic dialog may be useful. While Europe's per se approach may unnecessarily discourage some procompetitive discounting, there are some in the United States who view the approach of the U.S. courts as too laissez faire.(14) These opposing views are now being litigated in the Third Circuit in LePage's v. 3-M.(15) Fidelity rebates will also be the subject of an OECD roundtable next month in Paris. This is clearly an area that will benefit from putting the best minds on both sides of the Atlantic at work together in developing a policy that balances the potential

anticompetitive risks against the potential efficiency benefits and thereby promotes consumer welfare and economic progress.

III. Predatory Pricing

The U.S. law on predatory pricing has been reasonably clear at least since the Supreme Court decided the Brooke Group v. Brown & Williamson case in 1993.(16) There the Court held that to be found predatory, conduct must satisfy a two-part test: (1) the allegedly predatory price must be below an appropriate measure of cost, and (2) there must be a dangerous probability that the alleged predator will be able to recoup its losses through monopoly prices once its rivals exit the market.

The European Court of Justice has adopted the first leg of the Brooke Group test, but has expressly declined to adopt the second leg, holding that recoupment is not a necessary element of predation under Article 82.(17) In addition, whereas most U.S. courts have held that the appropriate measure of cost is average variable cost, the ECJ left open the possibility of finding prices above average variable cost but below average total cost predatory if they are "part of a plan for eliminating a competitor."(18)

We view recoupment as an essential element of the test because, as the Supreme Court has said, "cutting prices in order to increase business often is the very essence of competition."(19) There are many legitimate, procompetitive reasons for charging prices that are below cost, and there is no rational reason to deny consumers the benefits of lower prices in the absence of any realistic prospect for recouping short-term losses through later supracompetitive pricing.

In the United States, we are also chary of relying on subjective intent as a basis for antitrust liability. As Judge Easterbrook has put it very colorfully, we expect firms to want "to crush their rivals if they can."(20) Happily, in finding that Deutsche Post had engaged in predatory pricing in the market for business parcel services last year, the European Commission did not rely on subjective intent but instead adopted an "avoidable" cost standard, which looked only at the incremental or variable costs Deutsche Post incurred in providing these services, rather than at average total cost.(21) That approach is very similar to the approach we have taken in our American Airlines predation case, which is now before the Tenth Circuit Court of Appeals.(22)

IV. The Essential Facilities Doctrine

The fourth area in which we see a potentially significant difference between U.S. and EU law relates to the use of the so-called "essential facilities" doctrine to compel access to a dominant firm's facilities. While the essential facilities doctrine originated in the United States, we have construed the doctrine very narrowly, limiting it largely to regulated utilities and joint ventures, out of fear that its overbroad application would both chill

incentives to invest and innovate and require antitrust agencies to undertake the uncomfortable task of having to regulate the terms of access.(23)

For this reason, there are no cases in the United States applying the essential facilities doctrine to require the compulsory licensing of intellectual property. Instead, in dealing with antitrust challenges to refusals to license intellectual property, our courts have generally applied what we call the "Colgate" doctrine to hold that refusals to deal are lawful "in the absence of any purpose to create or maintain a monopoly."(24)

This issue is currently a hot topic of debate in the United States due to the seemingly conflicting decisions of the Ninth Circuit Court of Appeals in ITS v. Kodak(25) and the Federal Circuit in CSU v. Xerox.(26) Both cases involved the issue of whether a manufacturer of photocopiers could refuse to license its parts to rivals in the aftermarket. The Ninth Circuit held that while a refusal to license was presumptively lawful, it could be challenged if the reasons proffered for the refusal were "pretextual," inviting an inquiry into the defendant's subjective state of mind, which is something we generally try to avoid. The Federal Circuit expressly rejected the Ninth Circuit's approach for just this reason and suggested, in dicta, that a refusal to license should be found unlawful under the antitrust laws only if it were part of a tying arrangement designed to extend the patent monopoly into other fields or if the patent were invalid, a test which some have argued is too restrictive.(27)

A similar debate is ongoing in Europe as a result of two cases, Magill and IMS, applying, or attempting to apply, the essential facilities doctrine to intellectual property. In Magill, the ECJ ordered television stations in Ireland to license their program listings to a competitor seeking to create a single guide for all channels.(28) In IMS, the Commission concluded preliminarily that IMS had abused its dominant position by refusing to license to its competitors in Germany its copyrighted "brick structure" -- a system for dividing the country into geographic units for collecting data on pharmaceutical sales.(29) On appeal, the Court of First Instance (CFI) suspended the Commission's interim decision. Supporters of the application of the essential facilities doctrine in these cases have argued that they both involved "extraordinary circumstances" in that the copyrights in question did not involve the kind of creativity copyright law is designed to encourage and that the decisions therefore should not undercut the incentive to invest and innovate. This raises the prospect of basing competition policy on whether we think the intellectual property rights at issue are worth protecting; this kind of ex post judgment cannot help but create uncertainty and reduce the incentive to innovate.

This is another area where we and the EU are both currently reexamining our existing policies. The Federal Trade Commission and we are holding a series of hearings on intellectual property and antitrust. On May 22, we will be having a session to take a comparative look at how these issues are handled in the United States and Europe and will have EU officials and European lawyers participating. In addition, we are

considering forming a joint US/EU IP working group, similar to our joint merger working group, to coordinate our parallel reviews of our policies toward intellectual property more closely.

V. Monopoly Leveraging

The final area of divergence is what we call monopoly leveraging in the United States -- that is, using a dominant position in one market to gain a competitive advantage in another. Most U.S. courts have held that it is not unlawful for a firm with a monopoly in one market to use its monopoly power in that market to gain a competitive advantage in neighboring markets, unless by so doing it serves either to maintain its existing monopoly or to create a dangerous probability of gaining a monopoly in the adjacent market as well.(30) My understanding is that under EU law, by contrast, it is an abuse of dominance for a firm that is dominant in one market to use that position to gain a competitive advantage in a neighboring market in which it is not dominant even if the conduct is not shown to be likely to create a dominant position in the second market unless the dominant firm can show a legitimate business justification for its conduct.(31)

Our view, by contrast, is that, "so long as we allow a firm to compete in several markets, we must expect it to seek the competitive advantages of its broad-based activity -- more efficient production, greater ability to develop complementary products, reduced transactions costs, and so forth,"(32) and that allowing it to do so ultimately benefits consumers. Again, this is an area that would benefit from a constructive transatlantic dialog over our differing approaches.

Conclusion

This has been a pretty exhaustive -- and exhausting -- tour of the areas in which we currently see potentially significant differences between our competition policies in the United States and your's here in Europe. My purpose in identifying these is to open up a more in-depth transatlantic dialogue, both to determine how real these differences are and to begin discussing whether and how we should try to bridge them. And that brings me back to the title of my paper. While there is value in convergence, convergence should not become an end in itself. Our goal is not convergence for its own sake, but rather convergence around sound competition policies. I hope we can all agree that sound competition policies should generally be those that best promote efficiency, economic growth, and consumer welfare. I also hope that we can reach agreement that in pursuing these goals our competition policies should embody the guiding principles we laid out in Capetown.

Again, I want to emphasize that we are not trying to dictate to anyone what the best approach to these difficult issues is. Given the differences in our economies, our legal traditions and systems, and our institutions, what works best for us may not be best for

Europe. What I hope, however, is that we can at least agree on what our goals are and on what principles we should apply in developing administrable legal rules. I would hope we could also agree to work together in designing the best possible rules for our economies in these very difficult areas where we are both still struggling to get it right.

The silver lining to the GE/Honeywell cloud is that it has opened up a much more substantive dialog between Washington and Brussels, and I believe within Europe, over these important issues. I hope this talk contributes in some small way to moving that dialog forward.

FOOTNOTES

1. Deputy Assistant Attorney General for International Enforcement, Antitrust Division, U.S. Department of Justice. These remarks reflect my personal views and not necessarily those of the Department. I want to thank the many people who contributed importantly to this paper, including Nancy Garrison, Caldwell Harrop, Greg Werden, Robert Nicholson, John Fonte, Michael Klass, Christina Akers, and, of course, my assistant, Gloria Jenkins. I also want to thank Barry Hawk, Eleanor Fox, Douglas Melamed and Michael Katz who provided useful comments on earlier drafts. Any mistakes found in this speech are, of course, my own.

2. General Electric/Honeywell, Case No.M.2220, Commission decision of July 3, 2001.

3. The Need for Shock Treatment- the EU Barcelona Summit, Economist, Mar. 9, 2002, at 52.

4. Mario Monti, The Future for Competition Policy in the European Union, Address at Merchant Taylor's Hall, London (July 9, 2001).

5. William J. Kolasky, Comparative Merger control Analysis: Six Guiding Principles for Antitrust Agencies -- News and Old, Address to the International Bar Association Conference on competition Law and Policy in a Global Context, Cape Town, South Africa (Mar. 18, 2002)(available at usdoj.gov/atr/public/speeches/10845.htm).

6. Frederick Jenny, Competition and Efficiency, in Antitrust in a Global Economy, 1993 Corporate Law Institute, Fordham U. School of Law, 194 (B. Hawk, ed., 1994).

7. Mario Monti, supra n.4.

8. Commissioner of Competition v. Superior Propane, Inc., CT-98/02 (Competition Tribunal, April 4, 2002) (Reasons and Order Following the Reasons for Judgment of the

Federal Court of Appeal Dated April 4, 2001), available at: http://www.ct-tc.gc.ca/english/cases/propane/0238a.pdf

9. U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 4, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992, rev'd 1997), sec. 4.

10. Scott C. Lundquist and Scott A. Coleman, Promises and Realities: An Examination of the Post-Merger Performance of the SBC/PACIFIC Telesis and Bell Atlantic/NYNEX Companies, AARP Public Policy Institute, 9 (1999).

11. Carles Esteva Mosso and Stephen Ryan, Article 82- Abuse of a Dominant Position, The EC Law of Competition (Jonathan Faull & Ali Nikpay, eds., 1999), 178.

12. Virgin/British Airways, Case No. IV/D-2/34.780, Commission decision of July 14, 1999.

13. Virgin Atlantic Airways LTD v. British Airways PLC, 257 F.3d 256, (2d Cir. 2001).

14. See Willard K. Tom, David A. Balto, & Neil W. Averitt, Antocompetitiv4 Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing, 67 Antitrust L. J. 615 (2000). See als Dennis W. Carlton, A General Analysis of Exclusionary Conduct and Refusal to Deal -- Why Aspen and Kadak Are Misguided, 68 Antitrust L. J. 659 (2001).

15. LePage's, Inc. v. 3M, 277 F.3d 365 (3rd Cir. 2002).

16. Brooke Group LDT v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (U.S.N.C. 1993).

17. See Tetra Pak Rausing SA v. Comm'n, Case C-333/94P, [1996] ECR I-5951 (1996).

18. AKZO Chemie BV v. Comm'n, Case C-62/86, [1991] ECR I-3359 (1991).

19. Brooke Group, 509 U.S. at 226.

20. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989).

21. United Parcel Service/Deutsche Post AG, Case No. COMP/35.141, Commission decision of March 20, 2001.

22. U.S. v. AMR Corp., 140 F.Supp.2d 1141, (D.Kan Apr 27, 2001).

23. Gregory J. Werden, The Law and Economics of the Essential Facility Doctrine, 32

Saint Louis University Law Journal 433-479 (1987). See also Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841 (1989).

24. U.S. v. Colgate & Co., 250 U.S. 300, (1919).

25. Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997).

26. CSU LLC v. Xerox Corp., 531 U.S. 1143 (2001).

27. A. Douglas Melamed and Ali M. Stoeppelwerth, The CSU Case: Facts, Formalism and the Intersection of Antitrust and Intellectual Property Law, 10 Geo. Mason L. Rev. (forthcoming 2002). See also R. Hewitt Pate, Refusals to Deal and Intellectual Property Rights, Geo. Mason L. Rev. (forthcoming 2002).

28. Radio Telefix Eireann/Independent Television Publications Ltd., Case No. C-241/91 P and C-242/91 P, Commission decision on April 6, 1995.

29. National Data Corporation/IMS Global Services, Case No. COMP/38.044, Commission decision on July 3, 2001.

30. See ABA Section of Antitrust Law, I Antitrust Developments 282-85 (4th ed. 1997).

31. See, e.g., Tetra Pack Rausing SA v. Comm'n, C-333/94P, [1996] ECR I-5951 (1996).

32. Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

3. ANTITRUST IN THE EARLY 21ST CENTURY: SPEECH BY ASSISTANT ATTORNEY GENERAL JAMES

Date: **May 15, 2002**

Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, spoke on May 15 on Antitrust Policy in the 21st Century: Core Values and Convergence, *at a seminar sponsored by the European Commission's Directorate General for Competition and the U.S. Mission to the European Union in Brussels, Belgium.*

Below are James' remarks as prepared for delivery:

It is a pleasure for me to be here in Brussels today, at the gracious invitation of my friend, Commissioner Mario Monti. I want to thank our distinguished Ambassador to the European Union, Rockwell Schnabel, for his generous hospitality, and the several organizations that have assisted in putting this event together. I hope that my remarks this morning will be worth the effort that they have invested.

The state of international antitrust enforcement in the early 21st century is governed by three hard facts: First, as economic creatures (individual and corporate), we live in a global economy. Second, as citizens, we are governed by a multitude of national and regional governments. And third, facts one and two will prevail for the foreseeable future.

Antitrust is not very different in this respect from many other areas of law -- tax and securities law are obvious examples -- but the very success of the free market message in the last 15 years has spawned a multiplicity of national and regional antitrust regimes, nearly 100 in all, with roughly 65 of those requiring pre-merger notification.

In one sense, we should be heartened by this development, for it shows that countries all over the world are betting on competition to increase the efficiency of their producers, to deliver lower prices and better quality to their consumers, and to act as an engine of innovation and economic growth.

But the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm the very competitive values that antitrust is meant to protect. Those of us charged with enforcing the antitrust laws have an obligation to begin now to address the issues posed by multijurisdictional enforcement.

In my time with you this morning, I will discuss why we need to address the risks to the global economy posed by conflicting and divergent antitrust enforcement, even though many of those risks have thus far been mitigated on a transatlantic basis by the cooperative and productive relationship between the U.S. and EU antitrust agencies.

I will then discuss the evolution of antitrust law in the United States and the European Union, respectively, to show how the law and enforcement policy in both jurisdictions increasingly has come to focus appropriately on economic efficiency and consumer welfare goals, and how the continuing convergence of substance and process in the U.S. and EU provides lessons for addressing these issues on a global basis.

Finally, I will discuss how the new International Competition Network and other multilateral initiatives have the potential to improve significantly the quality of international antitrust enforcement in a wide range of areas, especially merger review.

I. The Problems Posed by Multijurisdictional Merger Enforcement in the Global Economy

I begin this discussion with two premises: that sound antitrust enforcement, including sound merger enforcement, is a good thing, and that it is a good thing, not only for the United States and the European Union, but for consumers and producers around the globe. The difficulty we face is how to accommodate the legitimate interests of jurisdictions in antitrust matters that affect their economies with the interests of businesses and consumers in not having antitrust enforcement used as a tool of industrial policy, protectionism, rent-seeking, or worse.

This is especially true in merger enforcement, where multinational transactions often involve contemporaneous reviews by multiple antitrust authorities. There are three basic risks posed by multijurisdictional merger review.

First, there is a risk that the cost, complexity, and sheer uncertainty of having to comply with 15 or 20 or 30 different merger regimes, with different information requirements and different time schedules, will kill some efficiency-enhancing deals of global scope, and cause others not to be attempted -- to the disadvantage of consumers all over the world. This one is sufficiently obvious as not to require further elaboration.

Second, there is a risk that different reviews may yield different results. Now, different results are not objectionable where the relevant economic facts are different in different jurisdictions (there are, after all, still regional, national, and local markets); or where the relevant facts and core values are the same, and there is merely a good faith difference of view on close cases. More serious issues are raised, however, where differences arise because the legal standards or analytical processes are significantly different. The divergence between the United States and the European Commission in last year's GE/Honeywell merger case illustrates this problem.

Finally, and most seriously, there is the significant risk that economic nationalism will prevail in antitrust merger enforcement in some jurisdictions, with the accompanying politicization of enforcement.

Antitrust is, or should be, focused on protecting competition, not competitors. As one of my predecessors, Thurman Arnold, said 60 years ago: "[t]he economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win."

Or, as our Supreme Court explained much more recently: "[t]he purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself...."

This is not a core value that will commend itself to every jurisdiction in every circumstance. As the economic stakes grow ever larger, firms are naturally driven to seek

protection and help from their governments; they can be expected to try to use antitrust as a weapon to be wielded against their opponents, foreign and domestic. This is a problem faced by new agencies and old.

But in multijurisdictional merger review, it is the most restrictive agency decision that may prevail, as my colleague, FTC Chairman Tim Muris, explained late last year. The potential economic consequences of antitrust law meaning one thing in one jurisdiction and something quite different in another are enormous. And if the public and the international business community find that merger decisions around the world are being made based, not on sound, consumer-welfare-based, economic theory, but on the basis of local interest buttressed by dubious economic and social theories unencumbered by economic evidence, then public support for sound antitrust enforcement necessarily will falter, and the global economy will suffer.

II. These Risks Have Been Mitigated by the US-EU Antitrust Relationship

Fortunately, these risks of multijurisdictional enforcement thus far have been significantly mitigated by the good working relationship forged over the past decade between the U.S. and EU antitrust agencies. It would be difficult to overstate the importance of the relationship between the United States and the European Union in a wide variety of areas, and I believe that the United States and the European Union, together, have a special duty to serve as a model of a sound working partnership in antitrust enforcement for the rest of the world.

The foundation of our relationship is the antitrust cooperation agreement that the U.S. and EU signed in 1991, under the leadership of then-Assistant Attorney General Jim Rill on the U.S. side and Sir Leon Brittan (as he then was) on the European side. Over the years, this agreement has undergirded progressively better cooperative ties between the U.S. and EU agencies.

In the merger area, the Justice Department has worked closely with the EC on numerous high-profile mergers, such as WorldCom/Sprint and Alcoa/Reynolds, aided by waivers by the parties of their confidentiality rights, and the FTC has done so as well, in cases like Boeing/Hughes and Air Liquide/Air Products/BOC.

On the cartel side, confidentiality constraints have limited our ability to work together to as great an extent as in merger cases, but the Division and the Commission still have been able to do important cooperative work in such cartel cases as Graphite Electrodes and Fine Arts Auctions. In the course of all this cooperative work, the U.S. and EU agencies have learned much from one another, which has led to improvements in antitrust enforcement on both sides of the Atlantic.

Of course, life is not all peaches and cream. Interspersed among all this beneficial merger and cartel cooperation are the odd Boeing/McDonnell Douglas and GE/Honeywell cases, which serve as powerful reminders that the U.S. and EU antitrust agencies still have much to do to promote sound convergence among our respective enforcement regimes. This is a job that all of us take very seriously.

Indeed, the GE/Honeywell debate itself has made an important contribution to convergence in merger review. At one point during that debate, I believed that the case demonstrated "a simple, but rather fundamental, doctrinal disagreement over the

economic purposes and scope of antitrust enforcement. What led the U.S. to clear the transaction -- the prospect that it would make the combined firm a more effective competitor -- was the very reason the EU opposed it."

But the Commission now has made it clear, even to us, that it shares our view that the ultimate goal of antitrust policy must be consumer welfare, and that it views merger-generated efficiencies positively and will not challenge a merger just because it creates a more efficient firm.

That said, there are many areas in which we and the Commission can learn more from one another and encourage an evolutionary procedural and substantive convergence. I believe that our common experience in GE/Honeywell has reinforced for antitrust officials on both sides of the Atlantic the value of close consultation on cases, and of full and frank discussion of antitrust issues in a variety of fora.

Antitrust people believe in markets, and we believe that if we lay out our wares in the marketplace of ideas, the market will provide sound guidance on theory and practice. In order to take our relationship to a more substantive plane, Commissioner Monti, Chairman Muris, and I agreed last Fall to reinvigorate our existing joint merger working group, a subject to which I will turn in a moment.

III. The Development of the United States' Focus on Competition and Efficiency

A. The Evolution of Antitrust in the United States: Flexibility and Openness

So our relationship with the EU continues to evolve, as does substantive antitrust enforcement on both sides of the Atlantic. Indeed, evolution has been the common coin of antitrust law throughout its history. The U.S. antitrust laws have been on the books for more than a century, and in that time, the views of antitrust enforcers, practitioners, and judges have evolved dramatically.

At the beginning of the 20th Century we were faced with the fundamental difficulty of interpreting the Sherman Act, because it could not possibly apply as broadly as its language suggests. This led to the development of the Rule of Reason and the per se rule of illegality for certain arrangements.

Beginning in the 1950's we were confronted with the task of making sense of the Clayton Act and its implications for merger enforcement. The 1960's brought the Great Structural Age of antitrust law, followed by the introduction of greater economic rigor into antitrust analysis in the 1970's and 1980's. Over the past decade, we have seen the dawn of the so-called "New Economy," with some observers questioning the proper role of antitrust enforcement in this "better, faster, high-tech" world.

It is only through a continuous dynamic process of questioning and analyzing our premises, assumptions, and theories that we have been able to keep moving forward to the benefit of the U.S. economy and consuming public.

Perhaps the two key elements to the success of this process have been flexibility and openness. We could not have come as far as we have if the U.S. courts, the antitrust agencies, and the entire antitrust community had not adapted to developments in economic thinking and evolving market realities.

Antitrust enforcement must be guided by sound legal and economic principles, and precedent and predictability are critical to any meaningful legal system. But marketplace

realities and economic learning are constantly evolving, so it is also critical that we be prepared to modify or abandon practices, rules, and theories when they no longer make sense.

With regard to openness, I cannot stress how important our ongoing public debate has been to the sound development of antitrust theory and policy. By and large, our system has not developed from the pronouncements of a handful of government theoreticians talking to themselves behind closed doors; rather, it has evolved out of a vibrant and continuous flow of judicial opinions, agency guidelines, and scholarship.

It is this open exchange of ideas that has helped us to evolve toward optimal approaches to difficult issues, and enabled us to challenge, and ultimately discard, ill-conceived doctrines or theories lacking in empirical support. The globalization of antitrust in recent decades has only enhanced this process, bringing new minds and fresh ideas to the conversation about antitrust.

B. The Evolution of Antitrust: An Ever-Increasing Focus on Economics, Efficiency, and Consumer Welfare

The evolutionary process that antitrust has undergone in the United States over the past century might seem from Brussels to be a patternless patchwork of twists and turns, of theories falling in and out of favor, or of ebbs and flows between more and less activist enforcement. In fact, however, the course of U.S. antitrust over the past decades has been an ever-tightening focus on economic analysis, efficiency, and consumer welfare.

It may seem obvious today that antitrust analysis should be guided by sound economics, that it should protect competition rather than competitors, and that it should promote efficiency rather than attempt to "regulate results." But a quick look at the history of American antitrust enforcement shows that these ideas, while always at the core of U.S. antitrust doctrine, have been tested time and again, with each test ultimately reaffirming the wisdom of our core antitrust values.

1. Discarded Theories

a. Shared Monopolies

Perhaps the best evidence of this is the number and significance of certain antitrust theories and approaches that, like Tyrannosaurus rex, dominated the landscape in their day, but happily have disappeared. The "shared monopoly" matters of 30 years ago spring immediately to mind. In the 1970s, the FTC developed the theory of shared monopoly to attack oligopolies and applied it against the leading competitors in the petroleum and cereal industries. The Department of Justice followed, investigating literally dozens of industries using the theory under Section 2 of the Sherman Act. Both agencies applied a purely structural approach to these matters, focusing not on specific unlawful conduct, but on entire markets that had evolved into tight oligopolies.

Fortunately, these initiatives -- which could have led to radical and pernicious restructuring in a number of industries -- were short-lived, because the agencies eventually realized that they had not developed, and were not likely to develop, hard evidence that would convince U.S. courts that the shared monopoly theory could be reconciled with the jurisprudence and economic rationale of the antitrust laws.

b. Conglomerate Mergers

The evolution of antitrust can also be seen in our approach to conglomerate mergers. During the ten-year period from 1965 to 1975, the United States experienced a wave of conglomerate mergers, and a number of them were challenged by the U.S. antitrust agencies. In one of these cases, FTC v. Procter & Gamble Co., the United States Supreme Court embraced a theory of competitive harm called "entrenchment." Under this entrenchment doctrine, mergers could be condemned if they strengthened an already dominant firm through greater efficiencies, or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals.

The Procter & Gamble decision led to a number of other cases invoking this theory. These cases stimulated a critical examination, and ultimate rejection, of the theory by legal and economic scholars who argued that the efficiencies that resulted from conglomerate mergers frequently left consumers better off. This persuaded both the Department and the FTC in 1982 explicitly to abandon entrenchment as a basis for challenging non-horizontal merger cases. The abandonment of the Procter & Gamble entrenchment theory in the United States was a clear step forward in the application of sound economic thinking to merger enforcement and of rigorous application of the principle that antitrust laws protect competition, efficiency and consumer welfare rather than individual competitors.

Per Se Treatment of Vertical Restraints and Certain Tying Arrangements

The evolution of antitrust can also be seen in the area of vertical restraints. Until the 1970s, the Supreme Court used per se rules to ban a wide variety of vertical business arrangements, such as where a manufacturer assigned exclusive territories or allocated customers among its distributors.

This broad ban of vertical relationships stirred all sorts of debate in antitrust circles, because of its tendency to prohibit demonstrably efficient and procompetitive modes of distribution. By the mid-1970s, a consensus began to emerge that many vertical restraints were procompetitive and that the per se rules against them were overly broad.

The pivotal event was the Supreme Court's decision in Continental T.V. Inc. v. GTE Sylvania, which held that non-price vertical restrictions were to be evaluated under the rule of reason. The Court's decision was explicitly based on the new economic thinking, and on the recognition that certain restraints can intensify interbrand competition and thereby promote efficiency and consumer welfare.

These principles are still in the process of refinement today, as evidenced by the Court of Appeals decision last year in United States v. Microsoft, which held that applying a per se rule against the technical tying of Windows and Internet Explorer could lead to a perverse result in which very real efficiencies would be ignored and tying that benefitted consumers would be forbidden.

Excessively Harsh Treatment of Horizontal Mergers

The evolution of antitrust can also be seen in our treatment of the "bread and butter" of civil antitrust enforcement -- horizontal mergers. During the 1950s and 1960s, antitrust agencies and courts feared market concentration at even low levels. The decisions of this era relied rigidly on market share statistics and also were affected by a variety of other

non-economic values, such as preserving small firms, preserving a large number of competitors, and maintaining consumer choice. For instance, in Brown Shoe Co. v. United States, the Supreme Court prohibited a merger where the parties held only 5% of the relevant market and also held that preserving small firms was a factor to be considered in merger cases.

Later, the Court invalidated mergers in United States v. Von's Grocery Co., and United States v. Pabst Brewing Co., where the parties' combined market shares were as low as 7% and 4.5%, respectively. Over time, economic research seriously undermined fears of low market share mergers and questioned the overly simplistic reliance on market structure as the both the beginning and end of competitive analysis.

These new concepts were embraced by the Supreme Court in United States v. General Dynamics, where the Court held that high market shares alone were insufficient to block a merger and required a deeper inquiry into the actual, future competitive effects of a merger. This landmark decision moved the enforcement agencies and the lower courts in the right direction, causing them to integrate sound economic principles into their decisions to a much greater extent than before.

Naturally, concepts such as ease of entry and efficiencies began to work their way into antitrust analysis, leading to the Department's landmark 1982 Merger Guidelines, which integrated those concepts into a framework that has become the preferred analytical framework for merger review in the United States and, indirectly, in many countries around the world.

Today, no U.S. enforcement agency or court would think of rejecting a merger solely based on structural presumptions from small increases in concentration, much less because the merger might endanger small firms.

2. "The Right Stuff": The Evolution to Economically Sound Enforcement Policies

One thing that seems clear after reviewing this list of antitrust theories that have been embraced and then discarded is that there has been a consistent trend over the last thirty years towards an increasing focus on economics, efficiency and consumer welfare. By remaining sufficiently flexible to incorporate the latest in economic thinking into our analysis, we have now refined our enforcement policies to the point where we are better able than ever to target transactions and practices that the antitrust laws are meant to address.

In my view, four key factors have enabled us to maintain our focus on the "right stuff" over the past few decades. These are: participation by the courts; an increased focus on efficiencies; issuance of the 1982 Merger Guidelines; and the increasing role of economists in agency investigations and decisionmaking.

3. Participation by the Courts

The landmark decisions in GTE Sylvania and General Dynamics, as well as numerous others at all levels of the federal judiciary, demonstrate the critical role that the courts have played in shaping antitrust doctrine into what it is today. I have already extolled the virtues of flexibility and an openness to new ideas. But flexibility cannot go unchecked. In the United States, even though the enforcement agencies have broad discretion in deciding which cases to bring, ultimately those cases must be proven before an

independent fact-finder. Not only have our courts been an important disciplining device on agency initiatives over the years, but they also have provided a vehicle for exchanging ideas on where antitrust should be.

Justices and judges have been willing to think hard about the issues and arguments central to antitrust, and their work has done much to shape antitrust law and policy and to keep us moving in the right direction. Independent judicial review by courts of general jurisdiction provides an important check on the sometime insularity of the antitrust community and the possibility that agency officials may become intoxicated with their own thinking, a phenomenon I refer to as "drinking one's own wine." Courts, with their focus on evidence and their grounding in the technical requirements of the law, subject our antitrust theories to a true test of merit.

3. Issuance of the 1982 Merger Guidelines

As I have already noted, courts and enforcement agencies have increasingly made use of the latest economic thinking, often to modify or discard faulty theories or approaches. However, the "modern era" really began for the Department of Justice in 1982 when AAG Bill Baxter released the Department's new Merger Guidelines, a document that incorporated economics into antitrust to a greater extent than ever before. The new Guidelines transformed merger enforcement: they provided a clear analytical framework for businesses and antitrust practitioners that was both workable and economically sound. Perhaps most importantly, the Guidelines established beyond any doubt that antitrust enforcement would be guided by economics, with a focus on preserving competition and consumer welfare. Although modified and improved over the years, the principles behind the 1982 Guidelines continue to form the bedrock of modern-day merger enforcement.

In the United States, guidelines themselves have been subjected to market tests. The Baxter Guidelines of 1982 found broad acceptance because they reflected a broad policy consensus and were grounded in the relevant jurisprudence.

By contrast, a "competing" set of merger guidelines published by the National Association of Attorneys General was a polemic attempt to turn back the clock to the 1960s by rejecting the focus on economics and strengthening structural presumptions. Those guidelines have not won general acceptance, and seldom have been cited, even in cases brought by the states themselves. This result shows that, in order to be meaningful, agency guidelines must reflect sound analytical principles.

c. Increased Focus on Efficiencies

The evolution of our thinking on efficiencies is, in effect, much like the evolution of antitrust itself. For much of the 20th century, U.S. court decisions ignored or downplayed efficiencies or even treated them as part of an anticompetitive effect, since they made it more difficult for other competitors to successfully compete.

The increasing use of economics in antitrust, and the realization that competition is enhanced when a firm improves its efficiency, even if competitors are harmed, caused a gradual recognition through the 1970s, 1980s, and 1990s that efficiencies could be an important part of merger review.

Our Merger Guidelines now explicitly recognize that merger-generated efficiencies can enhance competition and that the marginal cost reductions generated by efficiencies may

make coordination less likely or reduce incentives to raise price unilaterally. In these and other market situations, efficiencies are likely to lead to benefits to consumers.

Increasing Role of Economists at the Agencies

Finally, our economic approach to antitrust enforcement is not merely a matter of improvements in doctrine; it is also a matter of changes in institutional structure. During most of the Justice Department's history, the professional staff was essentially all attorneys, and economic analysis predictably tended to take a back seat to legal precedent, regardless of the economic context.

In 1973, however, the Department created the Economic Policy Organization in order to give economists a clear role in policy and case analysis. The role of economists within the Department has continued to grow over the past 30 years. Today, the Department employs nearly 60 highly-qualified Ph.D. economists in its Economic Analysis Group, and at least one staff economist is assigned to every civil investigative staff.

Our economists are an integral part of our investigations from beginning to end, and it is impossible for me to imagine the Department operating without them. Indeed, we continually are evaluating our review processes to ensure that economists are involved, not just in the decisionmaking functions of the Department, but in all phases of our inquiries.

Our integration of economists and economic thinking into the Department parallels what goes on in the wider U.S. antitrust world: courts, private practitioners, and law schools routinely integrate economists and economic thinking into their respective endeavors. Over the years, economists also have played an increasingly critical role in the U.S. as expert witnesses in litigated antitrust cases. Antitrust matters are often complex, and these experts can significantly enhance a court's understanding of the key economic theories, issues, and predictions on which a case may turn.

The enhanced importance of expert economic testimony in antitrust trials is, of course, a natural outgrowth of our recognition that the antitrust laws must applied with economic rigor. While generally a positive development, we must be careful not to ask too much of these experts. Antitrust cases also turn largely on the particular facts, and antitrust trials yield the best results when we leave the facts to witnesses who have first-hand knowledge of them and keep expert testimony focused on the economic analysis and conclusions that can be drawn from the facts.

e. Summing Up

Although the evolutionary process in U.S. antitrust law may never be complete, we have come a long way over the past hundred years, not least because of the creative tension between the theory-testing enforcement role of the antitrust agencies and the role of our courts as vigorous arbiters of the law. Our experience has taught us the benefits of an evolutionary process, and one that relies on flexibility and an open exchange of ideas.

No responsible person would still want to be operating under an antitrust regime based on the economic theories of the 1960s, much less the 1890s. Because economics is itself a field that changes and progresses over time, the law itself must incorporate the same kind of flexibility. Moreover, sound economics are not a matter of geography: the same principles ought to hold true whether one is in Newark, New Jersey, or Newark, England.

It therefore should come as no surprise that the same processes that are at work in the United States can also be seen at work in the European Union.

IV. The Recent Evolution of EU Antitrust Law

For its part, the European Commission has, under Commissioner Monti's leadership, been remarkably open to reform of its antitrust regime and willing to consider improvements in response to changes in the European and global economies, advances in economic understanding, and increased sharing of enforcement experience with the United States and others.

As Director General Alexander Schaub stated at Fordham last October, "Convergence is an organic process that grows out of learning from each other's experience, allowing all of us to retain the best elements. In a globalizing world it is important to take an open-minded approach and constantly consider whether one's own rules and practices can be improved."

A critical element of the current reform of EU competition policy, similar to the revolution in U.S. antitrust thinking that I described above, is an increased attention to economic analysis and a focus on consumer welfare. Again, to quote Dr. Schaub, the aim of all ongoing EU antitrust reforms "is the same: a more economic approach based on market realities and quite particularly on the power of the parties to harm competition to the detriment of consumers."

Convergence in this area between the U.S. and the EU has been quite impressive; as Commissioner Monti said last year, "We can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely, to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumers as its primary concern."

We have also been impressed by Commissioner Monti's commitment to hiring professional economists and enhancing their operational role in DG-COMP. As discussed above, the U.S. antitrust agencies went through a similar process during the late 1970s and early 1980s, and our economists are fully integrated in all steps of our enforcement process.

Indeed, Commissioner Monti is vigorously pursuing the modernization of the EC's antitrust regime on a broad front. The proposal he announced in September 2000 would, by abolishing the notification system and reallocating enforcement among the Commission and member state authorities, reduce administrative burdens on business and at the same time free scarce Commission resources for the essential mission of combating hard core cartels operating at the Community and global level.

An enhanced cooperative network among national antitrust authorities should also improve enforcement cooperation and information sharing among them and further the common commitment to sound competition policy within the EU and around the world.

The modernization program also includes important proposals that would provide effective enhancements to the Commission's investigative powers (such as the taking of oral statements from witnesses) and to the Commission's ability to enforce its powers when necessary (fines for breaches of procedural rules and periodic penalty payments). In our experience, such powerful enforcement tools are necessary, especially when dealing

with cartels that operate in secrecy.
I have heard criticisms by European counsel of some of these reforms, which echo what some American lawyers said 20 years ago about the economic revolution in American antitrust. Of course, Europeans have to decide for themselves how they want to proceed on these issues. But apparently, there are people who prefer doing what they have always done over embracing change
- that is, people who, for example, find the bureaucratic certainty of exemption letters preferable to having to figure out for themselves the competitive consequences of the their clients' actions. And there are lawyers who despair of performing a rule of reason-based economic analysis of transactions -- and even, I suspect, some who shrink at the prospect of talking, or listening, to economists. But our own antitrust bar eventually came to terms with the economic basis of antitrust, and I suspect that these naysayers will too.
Another area where the Commission is undertaking significant reform is merger review. The Green Paper published last December initiated a wide ranging review of the EU's Merger Control Regulation. It commits the EU to consider whether to move from its dominance standard to the possibly more "economically-based analysis" of the "less legally rigid" substantial lessening of competition test and whether to alter the role and scope of efficiencies in merger analysis. With respect to efficiencies, we obviously support Commissioner Monti's statement last year that "[W]e are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition."
Our agencies are coming to take the same positive view of merger-generated efficiencies and will not challenge a merger just because it creates a more efficient firm and thereby benefits consumers, even if competitors might suffer from the increased competition.
The Green Paper also proposes modifications in the merger process that would reduce the burden on notifying parties, such as expedited procedures for obviously harmless transactions, and it tackles difficult jurisdictional issues involving allocation of responsibilities between the Commission and member states, all of which also would have important effects on business certainty and notification burdens.
Further, the Green Paper addresses procedural issues, including additional time periods for review of proposed commitments by the parties, enhanced investigatory powers (e.g., the use of oral witness statements) and increased fines for breaches of procedural rules.
Finally, the Green Paper raises questions that concern businesses on both sides of the Atlantic about certain due process issues, such as the adequacy of judicial review in Commission merger proceedings.
In the crucial fight against hard core cartels, the commitment of Commissioner Monti and his staff has been impressive. In 2001 alone, the Commission imposed substantial fines amounting to a total of 1.8 billion euros (about $1.6 billion) against nearly 60 European and foreign firms. (Many of these cartels were prosecuted in the U.S. as well.) Not only did these fines exceed those imposed in any previous year, they were larger than the total fines imposed between the creation of the EC and the year 2000.
We also commend the Commissioner's leadership this year in securing the Commission's recent adoption of a more effective corporate leniency program. These changes are an

important step in the direction of greater transparency and predictability. They will substantially enhance the incentives to come forward by making a grant of full immunity automatic for the first company to qualify if the Commission was previously unaware of the violation.

Another important area of ongoing reform relates to the relation between antitrust and intellectual property. In the EU, the licensing of intellectual property has been governed by the Commission's 1996 Technology Transfer Block Exemption (TTBE).

As the Commission notes in its Evaluation Report on reform of the TTBE, the block exemption "is based on the traditional white, grey and black list approach, stipulating what is allowed, what may be allowed, and what is not allowed. No account is taken of the market position of the parties. This form-based and legalistic approach is at odds with [the Commission's] new block exemption regulations in the field of vertical restraints and of horizontal cooperation agreements. . . . The market power based approach is more flexible and inline with economic reality."

Consistent with the approach taken in the 1995 DOJ/FTC intellectual property guidelines, the Commission's review of the TTBE recognizes that the "time has come to draw a clear distinction between licensing involving competitors and licensing between non-competitors." The Commission is again suggesting an approach based on sound economic analysis of the competitive effects of intellectual property licensing.

Not coincidentally, the Department of Justice and the FTC are currently holding a wide-ranging series of hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, in order to study many of these same important issues. Commission witnesses are scheduled to participate in these hearings next week.

We and our EU counterparts have taken note that intellectual property and antitrust law share the common purpose of promoting dynamic competition and thereby enhancing consumer welfare. These property rights reward innovation and creativity by eliminating certain forms of imitation and unauthorized use through the creation of enforceable property rights in new products and processes and original works of expression. Antitrust law, in turn, promotes dynamic competition and consumer welfare by prohibiting certain conduct by market participants that unreasonably constrains the competitive process. More than ever before, the creation and dissemination of intellectual property is the engine driving economic growth and consumer satisfaction.

Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law addresses the nature and scope of intellectual property rights, we must take care to maintain proper incentives for the innovation and creativity on which our economies depend. A healthy respect for intellectual property rights will promote, not diminish, competition.

Antitrust can reinforce that respect by assuring that intellectual property rights are not overasserted or abused in ways that harm competition and injure the intellectual property rights of others. Consistent with our simultaneous consideration of issues at the intersection of intellectual property and antitrust, the U.S. agencies are discussing with our EU counterparts how we can enhance our level of consultation on these issues.

One final aspect of European reform that should be mentioned is the consistent effort of

Commissioner Monti and DG-COMP in promoting competition across the board, throughout all phases of the work of the European Commission. This role is anchored, of course, in the vision of the founders of the European Economic Community, who set forth as a fundamental principle for the Common Market "a system ensuring that competition in the internal market is not distorted."

In recent years DG-COMP's efforts have paid off by ensuring that the benefits of competition are reflected in the Commission's broad legislative programs in telecommunications, energy, transportation, and other sectors. We warmly applaud this competition advocacy mission, which is something we value greatly in our own work in the United States, and which should be central to the work of all antitrust authorities.

To return to where I began this discussion of antitrust reform in the EU, the Commission's recent actions and proposed actions on all of these matters are splendid examples of the spirit of frank exchanges of view and openness to change that should characterize an antitrust policy based on sound economics. I urge you here today, Commission officials, businesspeople, and members of the legal and academic community, closely to scrutinize what we antitrust enforcers do, and to work with us and the Commission to help maintain our focus on the core values of antitrust.

V. Meeting the Challenge of Multijurisdictional Antitrust Enforcement

The ancient Greek physician Hippocrates is famous for some advice that antitrust enforcers should constantly keep in view: "First, do no harm." But Hippocrates said something else that is relevant to our discussion today: "Healing is a matter of time, but it is sometimes a matter of opportunity." We live in a world where certain aspects of multijurisdictional merger enforcement pose risks to the health of the global economy, and I believe we should seize this opportunity to minimize those risks at an early stage.

Many international organizations are looking at antitrust issues these days, including the United Nations Conference on Trade and Development, the World Trade Organization, and the Organization for Economic Cooperation and Development, whose Competition Committee is doing very useful work to promote convergence in the merger review process among its members. "Convergence" is the key concept here.

No one seriously believes that the world is ready for a global antitrust code enforced by a global antitrust agency, nor has there been nearly enough convergence to justify the imposition of dispute settlement-based antitrust disciplines in trade agreements, in the WTO or elsewhere. The risks of sterile conflict and politicization of antitrust enforcement remain too great.

So I would like to conclude my remarks today by discussing two unusual, and perhaps unique, exercises that focus precisely on promoting antitrust convergence -- the U.S.-EU Merger Working Group and the International Competition Network.

Last September, the U.S. antitrust agencies and the European Commission agreed to devote substantial resources to reinvigorate our existing joint working group to speed the process of convergence across the ocean. (The group previously had completed some useful work in the area of merger remedies.)

Our working group is currently is in the process of examining three issues: (1) merger process and timing; (2) conglomerate mergers; and (3) the role of efficiencies in merger

analysis. The Department, the FTC, and DG-COMP have many lawyers and economists working together on these issues, proceeding largely by videoconferences supplemented by some in-person meetings.

We will complete work in some of these areas, and make significant progress on others, by the time of our next bilateral meeting. I anticipate that on some of these issues, we will make appreciable progress toward procedural or substantive convergence, and on others we will at least achieve a better understanding of our differences. My expectation is that the mergers working group will take on new issues in the coming year. Indeed, it might be useful to create working groups on other important subjects, such as the relationship between antitrust and intellectual property, so that the U.S. and EU agencies can move forward together on these issues.

Convergence, of course, is not an end in itself. We are not interested in wasting time and resources creating some sort of lowest-common-denominator "convergence" that solves no practical problems and contributes nothing to sound antitrust enforcement. Rather, we want to ensure that antitrust enforcement around the world follows sound processes and is based on the bedrock principle that antitrust protects competition, and not competitors.

I believe that the new International Competition Network (ICN) offers real promise of achieving this goal. Last October, I was fortunate to be among the senior antitrust officials from 14 jurisdiction s, including the European Commission, who created a new framework within which antitrust agencies from developed and developing countries will formulate and develop consensus positions on specific proposals for procedural and substantive convergence in antitrust enforcement The ICN will be "all antitrust, all the time."

Under the leadership of Canada's Konrad von Finckenstein, Chair of the ICN's Interim Steering Group, and with Commissioner Monti's enthusiastic support, this new network has made a good start. Already, 60 jurisdictions on six continents have joined the ICN; these jurisdictions represent roughly three-quarters of the world's Gross Domestic Product.

A great attraction and distinguishing feature of the ICN is that it is a "virtual network," flexibly organized around geographically diverse working groups, which work together largely by Internet, telephone, fax, and videoconference. This work methodology permits frequent, informal, and low-cost discussions that have obvious advantages over the periodic formal meeting structure of more traditional organizations. (There are, of course, disadvantages: calls involving people in Mexico City, Rome, Pretoria, Seoul, and Sydney cannot be made at times that are even roughly convenient for everyone concerned.)

Regular and focused interaction among scores of antitrust authorities will promote sound antitrust policies and procedures around the world. The ICN has another unusual feature: the private sector is playing a very important role in it. Members of the private bar on both sides of the Atlantic, businesspeople, academics, and representatives of international organizations (including OECD) are working with us side-by-side on each of the projects ICN undertakes, giving us -- and our work product -- the benefit of their knowledge, experience, and insights. Diversity in points of view will be crucial in developing ICN recommendations, because we want any recommendations ICN makes not only to be

sound, but to have a broad legitimacy in the global community.
ICN's goal is to contribute to global antitrust convergence by developing guiding principles and best practice recommendations to be endorsed, and then implemented voluntarily, by member agencies. Many jurisdictions share our concern about the issues raised by multijurisdictional merger reviews, so one of ICN's first projects is an examination of the multijurisdictional merger review process. (The other is the role of competition advocacy by antitrust agencies in emerging economies.)
The mission of ICN's Merger Review Working Group, which is chaired by one of my Deputies, Bill Kolasky, is to promote the adoption of best practices in the design and operation of merger review regimes in order (1) to enhance the effectiveness of each jurisdiction's merger review mechanisms; (2) to facilitate procedural and substantive convergence; and (3) to reduce the public and private time and cost of multijurisdictional merger reviews. Initially, the Working Group is concentrating on three areas: merger notification and review procedures; the analytical framework for merger review; and investigative techniques for merger review.
We hope to have important progress to announce or insights to share on all of these subjects, and on competition advocacy as well, by the first ICN conference, in late September in Naples. We do not expect to achieve convergence on all merger issues in the first year, or even the second or third. Rather, ICN members expect to maintain a continuous, collegial, and focused dialogue and to achieve meaningful improvements in the practice of international antitrust enforcement, one step at a time, over both the short and long terms.

Conclusion

At the beginning of the 21st century, we in the antitrust community need to work very hard to achieve a substantial degree of worldwide convergence on antitrust substance and process, based on the core value of protecting competition and promoting economic efficiency. The evolutionary history of antitrust in the U.S. and EU, and the goodwill and cooperative spirit among our agencies shows that this is an achievable goal. Instruments like the ICN promise to provide the means to achieve that goal.
Moving beyond our good faith efforts at cooperation and convergence will be difficult because it will require some combination of mutual respect and mutual restraint. In a world of overlapping jurisdictions, we already know that multiple agencies have the authority to act with respect to particular transactions or conduct. The open questions facing each authority, therefore, are should we act and how. We have, to recall Hippocrates, an opportunity to heal serious weaknesses in the process of antitrust enforcement to which many of us have devoted our professional lives. We must seize this opportunity.